United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/968
3 August 2000

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 968

Case No. 1074: ABDUL RAHIM

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Chittharanjan Felix Amerasinghe; Ms. Marsha A. Echols;

Whereas at the request of Iffat Fu'ad Abdul Rahim, a staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), the President of the Tribunal, with the agreement of the Respondent, successively extended to 28 February, 31 October 1998 and 30 April 1999 the time-limit for the filing of an application to the Tribunal;

Whereas, on 3 April 1999, the Applicant filed an application containing pleas which read as follows:

"**SECTION II. PLEAS**

Applicant prays the Tribunal to order the following:

i. That [the] Respondent should consider her re-engagement with the Agency a status of reinstatement, including maintaining her previous seniority in grade and step, since the date of her reappointment.

ii. That [the] Respondent should recognize her twenty-five [years of service] before reappointment, qualifying for termination indemnity.

iii. [That she should be paid] counseling fees and secretarial expenses estimated at US $ 500."

Whereas the Respondent filed his answer on 27 September 1999;

Whereas the Applicant filed written observations on 27 January 2000.

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA as an Area staff member, in the capacity of Teacher, Grade 5, at the Beisan School, Hama, North Area, Syrian Arab Republic (SAR), on 4 September 1961. Effective close-of-business 30 September 1986, the Applicant resigned from the Agency's service.

On 26 March 1992, the Applicant wrote to the Director, UNRWA Affairs, SAR, requesting "reinstatement to service or payment of termination indemnity ..." On 26 April 1992, the Field Administration Officer (FAO), SAR, replied to the Applicant, that all benefits due to her had been paid when she resigned and her contractual relation with the Agency came to an end. Thus, she was not entitled to any further termination benefits. Regarding her request for re-employment, he told her that the Agency's policy on reappointment was subject to the standards governing recruitment, as set out in the Area Staff Regulations and Rules. He also advised her that, since she had left the Agency more than three years ago, she would not be given priority consideration, but be viewed as an external candidate.

On 19 July 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB) against the decision not to re-employ her. On 29 March 1993, the JAB concluded that it had no jurisdiction to entertain her appeal, "because at the material time of the application, the Applicant did not enjoy the status of a staff member of the Agency", and recommended to declare the appeal non-receivable. The Commissioner-General informed the Applicant on 13 March 1993, that he had accepted the JAB's recommendation.

On 23 June 1993, the Applicant appealed to the United Nations Administrative Tribunal. In its Judgement No. 684, of 11 November 1994, the Tribunal ordered that the Applicant be accorded

priority consideration for the teaching posts in UNRWA for which she applied and was qualified, and if she was not appointed within nine months from the date of the judgement, she would be paid 12 months net base salary at the rate in effect at the time of resignation, as compensation.

On 25 March 1995, the Applicant appealed to the Director, UNRWA Affairs, to waive the condition of repayment of her provident fund benefits before reinstating her, to reinstate her to her former seniority in grade and step, and to consider the past years of her service as qualifying for termination indemnity.

On 26 March 1995, the Field Personnel Officer, SAR, advised the Applicant, that, pursuant to the Tribunal judgement in her case, it had been decided to re-employ her as a teacher at the Mathar School, Damascus, with effect from 1 April 1995. He enclosed two "option forms", giving her a choice to request reinstatement or reappointment.

On 18 April 1995, the FAO replied to the Applicant's letter of 25 March, advising her that he was unable to accede to her request. He drew her attention to Personnel Directive A/4/Part VI/Rev.5, which stipulates in paragraph 1.2 that "reinstatement of a staff member to his/her grade level reached at the time of his/her resignation and recognition of his/her prior service is conditional upon the staff member's repaying to the Agency all amounts received at the time of resignation". Since she was unable to repay the amounts received at the time of her resignation, her re-employment had to be by reappointment according to the Respondent. A Personnel Action form to that effect was issued recording her entry on duty as from 1 April 1995.

On 16 May 1995, the Applicant again lodged an appeal with the JAB.

On 19 March 1996, the Applicant wrote to the Field Personnel Officer requesting that her appointment status be converted to reinstatement and indicating that she would repay her separation benefits, at the latest in April 1996. On 31 March 1996, the last day on which she could do so, the Applicant filled out the required "option form", opting for reinstatement and indicating that she would repay the benefits in a lump sum, by the date of reinstatement.

On 9 April 1996, the Applicant wrote to the Field Personnel Officer requesting postponement of the conversion to reinstatement for an indefinite period, since she had failed to raise the required amount of money to refund the Agency.

On 15 April 1996, the Applicant was advised that her failure to meet the 31 March 1996 deadline for reinstatement rendered her request null and void; that her request for early voluntary retirement, contingent on the acceptance and processing of her request for reinstatement, was invalid; and, that any future request for conversion of her reappointment to reinstatement would be dismissed forthwith.

The JAB submitted its report on 17 March 1997. Its evaluation, judgement and recommendation read, in part, as follows:

"**III. EVALUATION AND JUDGEMENT**

...

d) By reference to Part IV of Personnel Directive A/4/Rev.4/Amend.9 ...

...

(e) ... the Board is of the opinion that there are no rules stating that the Appellant cannot be reinstated to the grade and level reached at the time of her resignation unless she repays the Agency the amount received at the time of the resignation, also the Board could not understand why previous experience in the Appellant's case was considered only when repaying back the money, and if she repaid back the money would she have gained more experience than she already has.

IV. RECOMMENDATION

16. In view of the foregoing ..., the Board unanimously makes its recommendation that the administrative decision appealed against be reviewed, with a view of:

(1) Reinstating the Appellant to a post with the same grade level she reached at the time of her resignation.

(2) The Appellant's situation concerning the Provident Fund, and the separation benefits should be calculated on the basis of a new appointment."

On 22 June 1997, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him as follows:

"... Notwithstanding that you did not seek a review of the administrative decision prior to appealing to the Board as required by the Rules, the Board did not address the issue of the receivability of the appeal and considered only the merits of the appeal. The Board was of the opinion that there was no requirement in the rules Directive that you repay your separations benefits to be entitled to be reinstated into your post at the same grade and step level you had reached at the time of your resignation in 1986 and accordingly recommended that you be reinstated at that level. However, it apparently was of the opinion that you were not entitled to restoration of your previous qualifying service for the purpose of calculating your separation benefits.

On the merits, I believe that the Board is incorrect. Reinstatement is a term defined in Personnel Directive A/4. To be entitled to re-employment by way of reinstatement, a staff member must repay all separation benefits previously received. You failed to do so. Paragraph 4 of Part VI of the Personnel Directive makes it clear that re-employment at a previous grade and step level can only occur by way of reinstatement. More importantly, an appeal against an administrative decision is not receivable by the Board unless a staff member has first sought the review of the decision in accordance with the Rules. Unlike non-adherence to time limits, the Board cannot waive this mandatory procedural requirement and because you did not comply with the Rules and seek the review of the decision which you impugn, on that ground primarily, I have dismissed your appeal.

..."

On 3 April 1999, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. Area staff rules 109.9 (4), 109.2 (6) and other relevant rules did not envisage any restrictions on the recognition of services qualifying for termination indemnity other than those included in the text.

2. Part IV of Personnel Directive A/4, as amended on 1 July 1980, is inconsistent with the afore-mentioned Area staff rules, unlawful, and did not maintain the acquired rights of Area staff members, including the Applicant.

3. The contested decision is inconsistent with the Declaration of Human Rights. Furthermore, it enriched the Respondent without cause and simultaneously impoverished the Applicant.

Whereas the Respondent's principal contentions are:

1. The application is not receivable, as the Applicant did not seek administrative review of the contested decision.

2. The decision to refuse reinstatement of the Applicant unless separation benefits are reimbursed is in accordance with Judgement No. 684, and with the Staff Rules and the Agency's policy.

3. Personnel Directive A/4/Part VI/Rev.5 is lawful and consistent with the Area Staff Rules.

The Tribunal, having deliberated from 6 July to 3 August 2000, now pronounces the following judgement:

I. The Applicant, who was re-employed by the Respondent in 1995 pursuant to Judgement No. 684, seeks an order changing the nature of that re-employment. In essence the Applicant asks the Tribunal to order the Respondent to reinstate her, thereby recognizing her previous twenty-five years of service from 1961 until her resignation in 1986 and the seniority in grade and step she had achieved before her 1986 resignation. Such an order would have the effect of making the Applicant eligible for full termination benefits, in spite of the fact that she received in 1986 all separation payments (including Provident Fund benefits) due to her as a result of her service from 1961 to 1986.

For procedural reasons, the Tribunal rejects the requests of the Applicant.

II. This matter requires the Tribunal to consider the receivability of the application. Article 7 of the Statute of the Tribunal mandates that an application "shall not be receivable unless the person concerned has previously submitted the dispute to the joint appeals body provided for in the staff regulations..." The joint appeals body provided for in the Staff Regulations is the JAB created by Area staff regulation 11.1 (Cod./A/59/Rev.25/Amend.28) of June 1991. In previous cases the Tribunal has refused to receive matters not previously submitted to the JAB. (Cf. Judgement No. 646, *Soltes* (1994), para. X).

III. In contrast, in this case the Applicant submitted her claim to the JAB, but without following Area staff rule 111.3 (1). That rule (like article 7 of the Tribunal's Statute) aims to ensure that a certain internal, administrative procedure has been followed before the matter is considered on appeal. Area staff rule 111.3 (1) requires that the staff member "shall as a first step, address a letter to the Agency's administration requesting that the administrative decision concerned ... be reviewed, and setting out his/her reasons for this request."

The Applicant, in describing the procedure followed by her, admits that the 18 April 1995 denial of her request was followed by a 6 May 1995 appeal to the JAB. This failure of the Applicant to abide by the mandatory procedure set forth in Area staff rule 111.3 (1) was raised by the Respondent before the JAB. Nevertheless, the JAB considered the matter on its merits and did not address the issue of receivability.

IV. The Agency's internal procedures include an initial request for review of the contested decision before an appeal to the JAB. This process allows the Agency to reconsider its decision and to amend or revise it. As stated in Judgement No. 905, *El-Far* (1998), para. III:

> "... administrative review is a very important internal procedure. It gives the Administration an opportunity to redress a grievance before it is taken any further... It is of the utmost importance that the Administration be given this opportunity, not only because it could result in avoidance of complicated and extended litigation but because it is only fair that the Administration be given the opportunity to reconsider and re-evaluate its decision before that decision is litigated. This is also the manner in which the process of settling grievances is generally structured in international administrative law."

V. In this matter, i..e., a matter heard by but not legally receivable by the JAB, the letter but not the intent of article 7 of the Statute has been followed.

The Tribunal considers that there are two possible interpretations of article 7.1. It may interpret the article so that any matter that has been submitted to the JAB is receivable, indicating that the legal concern of the Tribunal is only that the JAB has acted. In this event the Tribunal would not examine the legality of the procedures followed by the JAB. On the other hand, article 7.1 may be

interpreted to mean that internal administrative procedures, culminating in a recommendation by the JAB, must have been followed. In this event the Tribunal would underscore the importance of the established rules and procedures in all matters to be heard by this body and would thereby support the applicable rules of the Tribunal and the JAB.

VI. The Tribunal believes that it must require respect for internal Agency procedures, which the Applicant ignored. For this reason, article 7.1, read in conjunction with Area staff rule 111.3 (1), render this matter non-receivable.

VII. This matter is different from Judgement No. 916, *Douaji* (1999), in which the Respondent incorrectly assumed that the Applicant was challenging a decision taken four years prior to her appeal, when in fact she was challenging the Administration's inaction in relation to the implementation of that decision.

The Tribunal found in *Douaji* that the Applicant was entitled to lodge an appeal with the JAB and remanded the case to the JAB for consideration on the merits. However, in that case it was the JAB, not the Applicant, which had failed to follow the appropriate internal procedures, since it had refused to accept and respond to the Applicant's submission. Those are not the circumstances presented in this case.

This case is also different from *El-Far*, in which there had been no JAB consideration of the case. There the Respondent had made certain representations to the Applicant, which the Tribunal found precluded the Respondent from arguing that the Applicant had failed to request an administrative review.

VIII. For the foregoing reasons, the Tribunal rejects the application in its entirety, including the request for the payment of counseling fees and secretarial expenses.

(Signatures)

Hubert THIERRY
President

Chittharanjan Felix AMERASINGHE
Member

Marsha A. ECHOLS
Member

Geneva, 3 August 2000

Maritza STRUYVENBERG
Executive Secretary

United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/969
4 August 2000

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 969

Case No. 1027: RAJAN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Chittharanjan Felix Amerasinghe; Ms. Marsha A. Echols;

Whereas at the request of Srinivasan Souri Rajan, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), the President of the Tribunal, with the agreement of the Respondent, extended to 31 July 1998 the time-limit for the filing of an application with the Tribunal;

Whereas, on 9 July 1998, the Applicant filed an application containing pleas which read as follows:

"II. *Pleas*

...

I was selected for the post of Operations Officer at the classified NO-C level, appointed at [the] NO-B level but denied placement at the graded level of the post for unjustifiable reasons.

...

... I therefore appeal to the ... Tribunal to take appropriate corrective action in the matter.

d) *Compensation*:

Details of compensation are given below:

i)	If my placement to NO-C level had been effective from 1 January 1992 together with interest up to date of settlement.	US$ 8,500 1,000 (or the actual)
ii)	Compensation for damages to my reputation, humiliation, and mental torture, arising out of my supervisor's prejudice and the conspiracy organized by a group of Bhopal staff.	US$ 40,000
iii)	Compensation for the difference in monthly pension and lump sum amount payable to me if my appointment to NO-C by level was effective 1 January 1992; or else, my pension benefit be recast. The total financial loss will have an adverse bearing on the pensionary benefits to my spouse as well, later.	US$ 5,000 (or as determined by the Administrative Tribunal)
iv)	Administrative costs (for stationary, photocopying secretarial help, transmission charges, etc.).	US$ 500
v)	When I was selected, according to a fax message received by ICO [India Country Office] from New York, for a six-month short-term assignment to Baghdad in September 1992, under Emergency Commission, I was neither informed of this nor released by ICO. I was thus deprived of this rare opportunity which involved additional financial benefits to me.	US$ 20,000

e) *Any other relief*:

The period of over 3 years that the JAB (Joint Appeals Board) took for review of my case and submitting its recommendation to the Secretary-General and the constitution of two investigation ad hoc panels in 1996 and 1997, at the behest of JAB, had only contributed to abnormal delay and unnecessary publicity to my case with concomitant adverse effect on my reputation and continuous strain on my retired life. I would request the Tribunal to consider these aspects and order adequate relief measures."

Whereas the Respondent filed his answer on 28 February 2000;

Whereas the Applicant filed written observations on 22 June 2000;

Whereas, on 12 July 2000, the Tribunal put questions to the Respondent, to which he provided answers on 21 July 2000;

Whereas, on 2 August 2000, the Applicant submitted comments on the Respondent's submission of 21 July 2000;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 1 February 1973, in the UNICEF Office, New Delhi, India, on a three-month, fixed-term appointment with the functional title of Secretary/Stenographer. His appointment was extended several times and, effective 1 November 1977, converted to a permanent appointment. On 23 July 1989, he resigned his General Service position and, effective 24 July 1989, he received a two-year fixed-term Project Personnel appointment in the capacity of Assistant Finance Officer, at the NO-A level.

On 10 May 1991, the Applicant applied for the NO-C level post of Operations Officer, Bhopal, India. On 3 June 1991, the Applicant was informed by a Personnel Officer, India Country Office (ICO), New Delhi, that he had been appointed to the post of Operations Officer, Bhopal, India. He was also notified, however, that he was required to complete "a minimum-time-in-grade" of one year at the NO-B level before he could actually be placed at the budgeted (NO-C) level of the post.

On 14 October 1992, the Officer-in-Charge, Personnel Services, ICO, sent a memorandum to the Chief, Field Office, Bhopal, noting that the Applicant's required one year at the NO-B level was due to end on 31 December 1992 and requesting the Chief to submit his recommendation as to the Applicant's placement at the graded level of the post, as well as a performance evaluation report (PER) covering the period 1 January 1992 to 31 December 1992.

On 16 November 1992, the Chief, Field Office, Bhopal, informed the Applicant of various deficiencies in his performance. He gave the Applicant six months to improve his performance at which time another assessment would be made. The Applicant sent a memorandum to the Chief, Field Office, Bhopal, on 11 December 1992, requesting reconsideration of his decision.

On 3 March 1993, the Applicant's PER covering the period 1 January 1992 to 31 December 1992 was completed. He received five ratings of "3" (good) and one of "2" (passable) in a range of 1 to 5, with 5 being the highest.

On 7 April 1993, the Applicant wrote a memorandum to the Chief, Field Office, Bhopal, requesting the latter to send his recommendation for review by the Appointment and Promotion Committee (APC) for his placement to the graded level of the post. The Applicant copied the memorandum to an Ombudsperson for the Bhopal Field Office, requesting the latter to "resolve [his] grievance".

On 13 April 1993, the Chief, Personnel Services, ICO, once again requested the Chief, Field Office, Bhopal, to provide his recommendation on whether the Applicant should be considered for promotion. The following day, the Chief, Personnel Services, ICO, asked the Applicant to confirm whether, by copying the memorandum to the Ombudsperson, he had initiated a formal grievance process. The Applicant applied in the affirmative on 4 May 1993.

On 5 May 1993, the Chief, Field Office, Bhopal, wrote to the Applicant, noting that his performance had still not improved, despite several reminders. He requested the Applicant to provide him with a reason "why [he] should recommend [his] case to the graded level" and to submit a list of his "special accomplishments", after which the Chief, Field Office, Bhopal, would forward his recommendation to the Personnel Section, ICO.

On 7 May 1993, the Applicant notified the Ombudsperson that he was withdrawing his complaint. On 10 May 1993, the Applicant wrote a memorandum to the Chief, Field Office, Bhopal, stating that he had withdrawn his grievance appeal with the Ombudsperson.

On the same day, the Chief, Field Office, Bhopal, sent a memorandum to the Chief, Personnel Services, ICO, informing him that the Applicant had promised to improve his performance, and that, in view of his retirement in May 1994, and to "provide him with pensionary benefits" he recommended the Applicant's promotion to the NO-C grade level, effective 16 April 1993. In his reply of 14 May 1993, the Chief, Personnel Services, ICO, noted that the only relevant consideration for promotion was ability to perform at the higher level and not retirement or pension considerations. He accordingly requested a clear recommendation regarding the

Applicant's suitability for promotion to the graded level of the post. On 25 May 1993, the Chief, Field Office, Bhopal, again recommended that the Applicant be promoted.

On 6 July 1993, the Officer-in-Charge, Personnel Services, ICO, informed the Applicant that, having reviewed his case, the APC had concluded that his performance did not justify promotion to the NO-C level and that the UNICEF Representative had agreed with its conclusion.

On 18 March 1994, the Chief, Personnel Services, ICO, requested the State Representative, Bhopal Field Office, to forward his recommendation on whether or not the Applicant should be considered for promotion to the graded level of his post. On 23 March 1994, the State Representative, Bhopal Field Office, responded that, since he was not convinced of the Applicant's suitability, he was not in favour of recommending his promotion.

On 28 April 1994, the Applicant sent a memorandum to the Chief, Personnel Services, ICO, requesting that his case be considered by an independent committee.

The Chief, Personnel Services, ICO, informed the Applicant on 3 May, 1994 that the APC had once more declined to recommend his promotion and that the ICO Representative had agreed with that recommendation. By memorandum dated 18 May 1994 to the Chief, Personnel Services, ICO, the Applicant requested a review of the decision not to promote him.

The Applicant retired on 31 May 1994.

On 1 September 1994, the Applicant was informed by a Deputy Executive Director that the decision in his case stood. On 12 September 1994, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

On 4 April 1996, a special *ad-hoc* panel set up at the request of the JAB to investigate the Applicant's allegations of prejudice reported that they had failed to find any conclusive evidence of prejudice. However since the first panel had been constituted without the Applicant's knowledge or participation, a second panel was constituted which submitted its report on 27 March 1997, also concluding that there was no prejudice against the Applicant. Subsequently, on 22 September 1997, the JAB submitted its report. Its considerations, conclusions and recommendations read, in part, as follows:

"***Considerations***

...

46. ..., the Panel examined the material before it. It noted an inordinate amount of correspondence concerning difficulties in working relations between the Appellant and his supervisor as well as between him and his colleagues in the Bhopal Office. It was concerned by the Appellant's allegations and considered [them] to be of such importance for its review of the case that it requested a formal investigation. The Panel considered its request to be part of its authority under staff rule 111.2 (1), which allows it to seek information concerning the issue before it.

...

49. The report of the investigation panel was submitted to the Panel by the Representative of the Secretary-General. This Panel found it to be sound and felt that the conclusion of the report could highlight the issues in question. The conclusion of the investigation panel reads as follows:

> 'Based on the facts that emerged from the investigation, the [investigation] panel was of the unanimous view that there was no prejudice against the Appellant.
>
> ...'

50. ... In this context, it found that the Appellant had been considered for placement at the NO-C level, but was not promoted to the above level because his supervisor had not recommended him for promotion and because the ratings contained in his 1992 PER were not good enough to justify promotion. The Panel judged the conclusion of the investigation panel on the above issues had been self-explanatory and clarified the situation beyond reasonable doubt.

Conclusions and Recommendations

51. In view of the above, the Panel concluded that the decision not to promote the Appellant to the NO-C level did not violate his rights including his right for due process.

52. Therefore, the Panel makes *no recommendation* in support of the appeal."

On 17 February 1998, the Under-Secretary General for Management transmitted a copy of the JAB report to the Applicant and informed him, in part, as follows:

"...

The Secretary-General has taken note of the Panel's conclusion that the decision not to promote you to the NO-C level did not violate your rights including your right to due process and that the Panel made no recommendation in support of your appeal. The Secretary-General has decided to accept the Panel's conclusion and recommendation and to take no further action in respect of your case.

..."

On 9 July 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision to grant him appointment to the post of Operations Officer in 1991 at the NO-B level instead of the NO-C level was arbitrary and was caused by the rules and regulations "being twisting and interpreted to suit the convenience of the Management". Seven other staff members appointed to this position at the same time as him were appointed to the NO-C level. It was unfair for him to have been paid at the lower NO-B level while these seven others were doing similar work as him but yet drew salary at the NO-C level.

2. He should never have been compelled to complete one year at the NO-B level, secure the recommendation of his supervisor nor seek a further APC review of his case, as a precondition to his promotion to the NO-C level since the APC that had found him suitable for the position in 1991 had not stipulated any of these conditions.

3. His supervisor was biased toward him and treated him in a callus and humiliating manner. This "negative role" played by his supervisor in turn resulted in the denial of his placement at the NO-C level " with the accompanying financial benefits".

Whereas the Respondent's principal contentions are:

1. The Applicant was properly promoted to the NO-B level.

2. The Applicant has no right to promotion but only a right to consideration for promotion. The Applicant was properly considered for promotion, and his rights were not violated by his "non-promotion" to the NO-C level.

3. The decision not to promote the Applicant to the NO-C level was not the result of prejudice against him.

The Tribunal, having deliberated from 6 July to 4 August 2000, now pronounces the following judgement:

I. The Applicant requests "appropriate corrective action" and damages regarding the delay in his promotion to a higher grade and regarding certain procedural deficiencies in the process. The Tribunal finds that the Respondent followed the appropriate procedures and that, in spite of differences between the Applicant and himself, acted in a non-discriminatory manner toward the Applicant.

II. Along with seven other candidates, the Applicant was selected in 1991 for the post of Operations Officer at the NO-C level, although he occupied a post classified at level NO-A. However, in accordance with the relevant rules, the Applicant was required to complete an interim one year time-in-grade at the NO-B level, after which there would be a review by the APC before his definitive placement at the higher level. The Applicant complains about this one-year delay and about the failure to pay him at the NO-C level during this period.

III. The delay was required under the UNICEF Human Resources Manual. Chapter 4, paragraph 4.4.40 reads:

> "Promotion may only be effected to the next higher level. In the event of a staff member being appointed to a post, which is classified at two levels higher than his/her personal grade, promotion may only be affected to the next higher level. Upon completion of the minimum time in grade, the staff member is eligible to be reviewed by the APC for promotion to the level of the post."

Similar language is found in staff rule 104.14 (iii) (b).

IV. This reference to paragraph 4.4.40 is challenged by the Applicant, who argues that his new level was not a promotion but a direct appointment, which occurred during a recruitment campaign that altered the normal promotion procedures. According to the Applicant, these special circumstances led to appointments, rather than promotions, for internal and external applicants and obviated the need for a time in grade at the NO-B level. He refers to his previous change from the GS-6 to the NO-A level. While the situation described by the Applicant raises questions about the consistency of the Respondent's application of its rules, it cannot justify a variation from the express UNICEF Guidelines or the UN Staff Rules. It follows that the Applicant was placed and paid at the appropriate level.

V. The Applicant claims that paragraph 4.4.40 of the UNICEF Human Resources Manual was selectively followed. However, the Respondent answers that to the "best of [his] knowledge, this policy has always been applied and we are unaware of any instances where this has not been the case." This statement is not categorical and conflicts with that of the Applicant. The Tribunal has been presented with no legal basis for an internal selection process other than a promotion, which is governed by paragraph 4.4.40.

VI. The Applicant argues that the procedure followed was discriminatory, because external candidates were appointed directly to the NO-C level as were seven other internal candidates. He presents no support for those statements or for his conclusion that the backgrounds of the other internal candidates were comparable. On the other hand, the Respondent has stated that the "other seven staff members who were appointed to the posts of Operations Officer were already encumbering NO-B posts and serving at that level (ranging from 7 months to 5 years). They applied for posts, which were only one level higher than that of the posts they were occupying." There is no evidence to the contrary.

VII. The Tribunal next turns to the matter of the delays in the proceedings of the JAB and the Agency's internal appeals process, which continued for approximately three years. The delay was in part the result of the investigations by *ad hoc* panels of the Applicant's claims of prejudice. The

report of the first panel, created without the knowledge of the Applicant and completed without participation by the Applicant, was not forwarded to the JAB as a result of questions raised by the Applicant. A second panel was created and convened. Its report was forwarded to the JAB, which did not have the benefit of the Applicant's reaction to the report of the *ad hoc* panel but did consider all the Applicant's claims during its proceedings.

The resort to *ad hoc* panels delayed the internal review process. However, the Tribunal finds that the use of these panels showed the Agency's desire to explore the allegations of wrongdoing and prejudice, rather than a desire to delay. The procedures followed and the consequent delay were designed to promote the administration of justice. This was not a case of inaction by the Agency. (Cf. Judgement No. 892, *Sitnikova* (1998)). Rather, the resulting increase in the time required for the internal review process was justifiable and was, in some sense, a response to the concerns raised by the Applicant. The decision to convene an *ad hoc* panel, to re-constitute it in response to objections raised by the Applicant and to conduct a thorough investigation were reasons for the justifiable delay. (Cf. Judgement No. 897, *Jhuthi* (1998)). Although the three-year period was a lengthy one and contributed to the uncertainty of the situation, the Tribunal finds that it was reasonable under the circumstances.

VIII. Regarding the Applicant's assertions of prejudice, the Tribunal notes that the *ad hoc* panel and JAB reviewed the situation at the Bhopal Field Office. Obviously, there were anomalies and differences among personnel. However, the Tribunal is persuaded by the assessments of the panel and the JAB in this matter, both of which gathered information and heard witnesses. The JAB concluded that there was no prejudice against the Applicant. Their conclusion was not unreasonable based on the record before us (including the many submissions by the Applicant), although the Tribunal notes that the JAB also made recommendations for improvements at Bhopal, such as staff training. The Applicant has the burden of proving prejudice and must do so with convincing evidence, e.g., of substantive or procedural defects or improper motive. (Cf. Judgement No. 928, *Abdulhadi et al.*, (1999)). He has not met that burden in this case.

IX. For the foregoing reasons, the Tribunal rejects all claims of the Applicant.

(Signatures)

Mayer GABAY
Vice-President, presiding

Chittharanjan Felix AMERASINGHE
Member

Marsha A. ECHOLS
Member

Geneva, 4 August 2000

Maritza STRUYVENBERG
Executive Secretary

United Nations

AT

Administrative Tribunal

Distr.
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AT/DEC/970
17 November 2000

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 970

Cases No. 820: MANSOUR
No. 880: MANSOUR

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, First Vice-President, presiding; Mr. Julio Barboza, Second Vice-President; Mr. Kevin Haugh;

Whereas, on 14 June 1999, Khalil Mohammed Mansour, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an application in which he requested, in accordance with article 11 of the Statute of the Tribunal, the revision of Judgement No. 894, rendered by the Tribunal on 20 November 1998;

Whereas the application contained pleas which requested the Tribunal to:

"...

Annul the two deferrals of my salary annual increment of June 10, 1993 and of September 20, 1993;

Annul the termination of my appointment of March 6, 1994 and return to status quo ante separation and deferrals, and reinstate me in former post as Vehicle Maintenance Officer, SAR [Syrian Arab Republic], with clear statement;

Annul the contested new post description. Otherwise the Agency is to make amend[sic] to meet the standard of new responsibilities added to my ex-job i.e. Vehicle Maintenance Officer, SAR. That is left to the discretion of the Tribunal;

Consider the period from March 7, 1994 until my return to my ex-job as a working days period. With complete rights in promotion and other administrati[ve] actions.

The Agency is to issue a letter of apology for the harm and unfair measures wrongly taken against me; and

$ 50,000 (fifty thousand) US dollars to be paid in compensation for the moral and financial harm, injustice and prejudice which my family and I suffered."

Whereas the Respondent filed his answer on 6 February 2000;

Whereas the facts in the cases were set forth in Judgement No. 777.

Whereas the Applicant's principal contentions are:

1. The Tribunal failed to consider all relevant evidence in Judgements No. 777 and No. 894.

2. A review of the evidence will result in a revised decision on the merits in the Applicant's favor.

Whereas the Respondent's principal contentions are:

1. The Applicant has failed to identify any new facts or evidence of such a nature as to be a decisive factor unknown to the Tribunal at the time it rendered Judgements No. 777 and No. 894.

2. The application for revision is merely an attempt to seek a reconsideration of his applications in the prior cases.

The Tribunal, having deliberated from 13 to 17 November 2000, now pronounces the following judgement:

I. The Applicant has requested a revision of Judgement No. 894. This judgement was rendered following a request by the Applicant for revision of Judgement No. 777.

II. As is set out in article 11 of the Statute of the Tribunal:

> "The Secretary-General or the applicant may apply to the Tribunal for a revision of a judgment on the basis of the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence."

III. It is essential for a revision to be successful that a new fact has been discovered, which is of such importance that, had the Tribunal known of its existence at the time it rendered the judgement, the outcome would have been different.

IV. In the present case, the Applicant requests the Tribunal to order production of two documents. The Tribunal notes that he had requested production of the same two documents, amongst others, in his earlier application in 1998. As can be seen from paragraph IV of Judgement No. 894, the Tribunal determined in that judgement which documents were "potentially relevant" and only reviewed those documents. Thus, it has already determined that the two documents in question are not "potentially relevant".

V. The Tribunal notes that as the "new" fact adduced by the Applicant is not a fact as stipulated in article 11. Consequently, the Applicant's request does not fulfil the requirements for a revision. The Applicant requests the Tribunal to revoke its earlier finding that these documents are not relevant to the case and on that basis to reconsider and change its former judgement. In the view of the

Tribunal, that would imply a revision not contemplated in the Statute (discovery of a new and decisive fact).

VI. For the foregoing reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Mayer GABAY
First Vice-President, presiding

Julio BARBOZA
Second Vice-President

Kevin HAUGH
Member

New York, 17 November 2000

Maritza STRUYVENBERG
Executive Secretary

United Nations

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/971
17 November 2000

ENGLISH
ORIGINAL: FRENCH

ADMINISTRATIVE TRIBUNAL

Judgement No. 971

Case No 828: STEPANENKO

Against: The Secretary-General of the International Maritime Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Mayer Gabay, Vice-President, presiding; Mr. Victor Yenyi Olungu; Mr. Kevin Haugh;

Whereas, on 10 August 1999, Vladimir Alekseevich Stepanenko, a former staff member of the International Maritime Organization (hereinafter referred to as IMO), filed an application in which he requested, in accordance with article 11 of the Statute of the Tribunal, the revision of Judgement No. 763 rendered by the Tribunal on 26 July 1996;

Whereas the Applicant's pleas read, in part, as follows:

"1. I seek to be reappointed as Head, Russian Translation Section, Conference Division, International Maritime (IMO). I respectfully request the Tribunal to revoke the decision of the IMO Secretary-General, regarding the post for which I applied, of which I was notified by the letter dated 3 August 1999 (...).

2. I respectfully request the Tribunal to recognize the the IMO Secretary-General, in contradiction to the Judgement No. 763 of the United Nations Administrative Tribunal (UNAT), did not consider fully and reasonably, on a priority basis, my application dated 21 November 1998 (...).

3. I respectfully request the Tribunal to recognize that the IMO Secretary-General did not give reasonable explanation and grounds for the denial to appoint myself for the post of Head, Russian Translation Section, in his reply dated 3 August 1999 (...), communicated to me, by the Director, Administrative Division.

4. I respectfully request the Tribunal to recognize that the IMO Secretary-General should have appointed me to the post of Head, Russian Translation Section, in case my application to the post dated 21 November 1998 (...), had been given appropriate, fair and priority consideration under UNAT Judgement No. 763.

5. In the event of compensation being paid in lieu of reappointment, I respectfully request the granting of award in the amount of three years net base salary, bearing in mind especially great moral injury sustained by myself""

Whereas the Respondent filed his answer on 5 May 2000;

Whereas the facts in the case were set out in Judgement No. 763.

Whereas the Applicant's principal contentions are:

1. The Respondent failed to give the Applicant full and fair priority consideration as required pursuant to Judgement No. 763.

2. The Applicant suffered substantial moral injury as a result of the Respondent`s actions.

Whereas the Respondent's principal contentions are:

1. The application is procedurally and substantively insufficient as a result of the Applicant's failure to submit the claim to an internal appeals body in compliance with article 7 of the Tribunal's Statute.

2. The Applicant failed to comply with the requirements of the Tribunal Statute article 11 for revision of judgements.

3. The Respondent acted lawfully and with reasonable justification with respect to priority consideration, secondment and internal promotion.

4. The Applicant is not entitled automatically to be given precedence over another candidate applying for the post.

5. The Applicant failed to prove injury or damages and is entitled to no compensation.

The Tribunal, having deliberated from 26 October to 17 November 2000, now ponounces the following judgement:

I. The Applicant requests the Tribunal to interpret the operative part of Judgement No. 763 of 26 July 1996, which ordered the Respondent to give the Applicant priority consideration for any post for which he fulfils the conditions and is found to be qualified.

The Applicant states that the post of Head of the IMO Russian Translation Service became vacant and that by his letter of 21 November 1998 he requested that he be appointed in that post. He further states that the Respondent, by a letter dated 3 August 1999, informed him of the decision to promote another internal candidate on the basis of the latter's seniority and qualifications. Considering that the appointment of this candidate would be contrary to the operative part of the aforementioned judgement, the Applicant has requested the interpretation and rescission of the Respondent's decision or compensation for moral injury.

II. The Respondent contends that the application is irreceivable because the requirements for an application for revision of judgement have not been fulfilled, in particular because there has been no discovery of some fact unknown at the time the judgement was given. He further maintains that the Tribunal did not order him to reinstate and promote the Applicant automatically but to consider his candidacy for the post, which was done.

III. The Tribunal considers that the application concerns the interpretation and not the revision of the judgement. The Applicant did not know how to state his claims clearly.

The request for interpretation concerns the phrase which appears in the operative part of the judgement, namely "be given priority consideration".

IV. As it has stated in its Judgements No. 61, *Crawford* (1955) and No. 366, *Sabatier* (1986), the Tribunal considers that in accordance with the general principles of law, it is competent to interpret its own judgements: such competence is inherent in the judicial function of a tribunal. It has decided not to receive a new application and to insist that the Applicant demonstrate a legitimate interest. In this case, the Applicant who, rightly or wrongly, believes that he has been treated unfairly has an interest in seeing the operative part of the judgement clarified.

V. With regard to the meaning to be attributed to the phrase "be given priority consideration", the Tribunal emphasizes that its decision cannot be interpreted as running counter to the principle that staff members in the same situation must be treated equally, a principle which governs the management of the international civil service. It follows that in using that phrase, the Tribunal did not intend to order the automatic reinstatement and promotion of the Applicant in whose favour the judgement was rendered. According to the Applicant's line of reasoning, the Tribunal would substitute its judgement for that of the Administration in matters of promotion and appointment, fields in which the Respondent possesses wide discretion. Furthermore, the concern to provide the Organization with staff meeting the highest standards of efficiency, competency and integrity in accordance with Article 101 of the Charter, which has often been reflected in the decisions of the Tribunal (Judgement No. 385, *Sobel* (1987)), prevents this phrase from being interpreted too restrictively.

Consequently, the Tribunal interprets the phrase "be given priority consideration" as follows: When considering candidacies for the vacant post for which the Applicant is qualified, the Administration must give priority consideration to the candidacy of the Applicant, but that does not preclude consideration of other candidates for the same post.

However, if the Applicant has the same qualifications as another candidate, preference shall be given to the Applicant". This interpretation is compatible with prior decisions.

VI. With regard to the rescission of the decision and the compensation requested, the Applicant has not proved, as he is required to do, that his qualifications for the post are equal or superior to those of the staff member actually promoted; consequently, the Tribunal cannot find that there was any abuse of power in the exercise of discretion.

VII. For these reasons, the Tribunal rejects the application.

(Signatures)

Mayer GABAY
Vice-President, presiding

Victor YENYI OLUNGU
Member

Kevin HAUGH
Member

New York, 17 November 2000

Maritza STRUYVENBERG
Executive Secretary